



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**ENVIRONMENT & LAND COURT**  
**CIVIL CASE NO.217 OF 2012**

CHARLES NGATIA NGUYO.....PLAINTIFF

**VERSUS**

EKIRA GATHONI KARIITHI & ANOTHER.....DEFENDANT

**J U D G M E N T**

The Plaintiff, Charles Ngatia Nguyo is the son of Nguyo Weru and Wairimu Nguyo both deceased. He is a legal representative of the late Wairimu Nguyo through a grant of succession issued on the 26th of February 2010 in Succession Cause No.124 of 2010.

The Defendants are widows of the late Gerishon Kariithi Weru who are also the legal representatives of his estate. It is alleged, which allegation is not controverted, that the late Gerishon Kariithi Weru was the elder brother of the late Nguyo Weru and held land Parcel no Magutu/Gaikuyu/952 on his behalf and on behalf of his brother.

The plaintiff has stated in the plaint that during land consolidation and demarcation, the entire of his grandfathers' land measuring 9.25 acres was registered in the names of the late Gerishon Kariithi Weru to hold it in trust for the entire family and therefore his parents were entitled to 2.62 acres thereof.

The late Gerishon Kariithi Weru failed to voluntarily surrender the plaintiff's parents portion following which his mother filed civil suit No.17 of 1992 at the Senior Resident Magistrates Court at Karatina and a decree was entered in her favour for transfer of 2.62 acres of the land. The decision by the Magistrate's Court was set aside by High Court of Kenya on appeal for lack of jurisdiction by the Magistrates Court to entertain the claim.

The High Court referred the matter to the Land Disputes Tribunal at Nyeri for arbitration but the Tribunal was abolished before the matter could be entertained.

According to the plaintiff, prior to his death, his uncle subdivided the land in dispute into several portions as appears in the search certificates. He transferred three of the resultant portions to his children but retained titles to four other resultant portions namely Magutu/Gaikuyu/952, 953, 955 and 956 each measuring 0.476 Ha. He asserts that the four portions are enough to satisfy his claim of 2.62 acres which can be done by transfer of L.R. No.952 and 953 to his name and a further portion measuring 0.159 Ha from L.R No. Magutu/Gaikuyu/955. The four parcels of land according to the plaintiff are still registered in the name of the deceased and that part of the estate is yet to be administered. He claims that his father did not have any other parcel of land.

The defendants filed a replying affidavit in response to the originating motion. The same is deponed by Ekira Gathoni Kariithi on her behalf and on behalf of Teresia Mumbi Kariithi as joint legal representatives of the estate of Gerishon Kariithi Weru (deceased).

The import of the replying affidavit is that the allegations by the plaintiff are denied. The gist of the affidavit is that there was a long standing dispute between Kariithi Weru and Wairimu, Nguyo both deceased pertaining to L.R No.Magutu/Gaikuyu/261 which culminated to an award being made by the Mathira Land Disputes Tribunal which award was set aside by the High Court in Nyeri High Civil Appeal No.112 of 1994.

The Dispute was referred for arbitration to the Nyeri Land Disputes Tribunal but unfortunately, the said Wairimu Nguyo passed away on the 7/5/2000 before the hearing and determination of the said dispute. On the 14/10/2000 Kariithi Weru subdivided and transferred land No.Magutu/Gaikuyu/261 to his children.

According to the defendant the parcels of land cited by the plaintiff were resultant subdivision of the original parcel of land Magutu/Gaikuyu/261 which the deceased transferred to his children as follows:

- i. ***L.R. Magutu Gaikuyu/952 To Christopher Muraguri Kariithi***
- ii. ***L.R. Maguru Gaikuyu/953 To James Weru Kariith***
- iii. ***L.R. Maguru Gaikuyu/955 To Solomon Ngatia Kariithi***
- iv. ***L.R. Maguru Gaikuyu/956 To Simon Kariithi Waweru***

The deponent further states that Kariithi Weru duly executed the requisite transfer of the respective parcels of land in favour of his children. In essence, the defendants are stating that the parcels of land that were not mentioned in the succession cause were transferred to the children of Kariithi Weru as gifts before his death and the rest were named as assets of the deceased in the succession cause.

During the hearing of the suit, the plaintiff relied on the affidavit dated 16/10/2012. He produced limited grant letters of administration and the full grant of the letters of administration.

The plaintiff did a search on the parcel of land and produced the certificates of search as his exhibits. The search certificate dated 27th December 2011 confirms that the property as at the date of search was measuring approximately 9.5 acres, a freehold title in the name of Kariithi S/O Weru. The certificate of official search further confirms that as at the 21/7/2009 entry order No.1 had been reinstated meaning that the property was registered in the name of Kariithi Weru and the same was to be shared between Wairimu Nguyo and Kariithi Weru. The plaintiff's mother had filed a suit in 1992 at Karatina where the court had ordered that she be given 2.62 acres of land. This order was reversed on appeal and the matter was referred to the Nyeri Disputes Land Tribunal but the matter never proceeded.

Gerishon Kariithi went on and subdivided the land into 7 pieces. He gave three pieces to his children and 4 pieces he registered in his name.

The plaintiff called one witness, Bernard Munuhe Kinyanjui who briefly stated that the court at Karatina had awarded the plaintiff 2.62 acres of land. He stated that the plaintiff's father and the defendants' husband were brothers and that the latter was the eldest. He stated that the dispute between the two families started in the village and that the same was between Kariithi Weru and Wairimu Nguyo. Gerishon Kariithi did not appeal when the matter was decided according to this witness. He appeared not to know much about the appeal and therefore was not useful in that aspect.

The Defendants did not testify due to their frail age and therefore their son Mr. Nguyo Kareithi a son of Kareithi Weru testified at length.

He is a **police officer** based at Jomo Kenyatta International Airport in Nairobi and a **son** to the late Kariithi Weru who died on 11/10/2005 and **Ekra Gathoni Kariithi**, *his mother* and **Teresia Mumbi** *his step mother*, and a cousin to the plaintiff **Charles Ngatia nguyo**. His mothers obtained letters of administration which were confirmed on 12/10/2007. According to Nguyo Kareithi before his father's death, there was a family dispute in respect of the suit parcel of land with Wairimu Nguyo the mother of the plaintiff.

The dispute was initially determined by the Mathira Land Disputes Tribunal whereby Wairimu Nguyo was awarded 2.62 acres in Magutu/Gaikuyu/261.

The decision of the tribunal was reversed by an order of the High Court in Nyeri High Civil Case No.112 of 1994 made on 12/2/1997 which referred the matter to the Nyeri Land Disputes Tribunal for arbitration. According to the witness, the arbitration was done but the final decision was never made as the process was not concluded. Wairimu Nguyo subsequently died in the year 2000 before the decision of elders was made and the same has not been made to date.

Mr Nguyo Kareithi further testified that their father called them and took them to the Land Board and divided land No. Magutu/Gaikuyu/261 to his sons as shown in paragraph 7 of the replying affidavit. The parcels of land as per now are in the names of persons listed in paragraph 7 of the replying affidavit. He produced search certificates for the said parcels of land.

When the succession cause in the estate of Kareithi Weru was slated for the confirmation of grant, the administratrix did not include the parcels of land that had been transferred by the late Kariithi Weru as gifts before he died because they did not form part of the estate having been transferred by the deceased as gifts. He prayed that the court finds that his mother did not have land to give to the plaintiff.

Having considered the originating summons, supporting affidavit, replying affidavit and evidence adduced by the parties, the undisputed facts of this case are that the plaintiff's father and the defendant's husband were brothers the latter being the eldest. The plaintiff's father Nguyo Weru and the defendant's husband Gerishon Kariithi Weru were sons of Weru the grandfather of the plaintiff and Mr Nguyo Kareithi. During land consolidation and demarcation the entire of Weru's land was consolidated and title No Konyu/Ichuga/782 comprising 9.2 acres was created and registered in the names of Gerishon Kariithi Weru who the elder brother to Nguyo Weru. The plaintiff's mother attempted to recover the portion of land that belonged to her husband under Kikuyu customary law through the Nyeri District Land Disputes Tribunal but died before the Tribunal could hear the claim. The plaintiff took up the matter and filed the Originating Summons.

To reach a valid determination the court has considered the provision of Sections 28, 126 and 141 of the Registered Land Act Cap 300 laws of Kenya (repealed).

**Section 28 provides that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in the Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require notice on the register:**

**Section 126 (1) provides that a person acquiring land, a lease or a charge in a fiduciary capacity may be described by that capacity in the instrument of acquisition and, if so described, shall be registered with the addition of the words "as trustee", but the Registrar shall not enter particulars of any trust in the register.**

**Section 143 provides that subject to subsection (2), the court may order rectification of the register by directing that any registration be canceled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**

The above sections especially section 126 contemplated the holding of land in trust and the registration of the person as a trustee. There is a school of thought that believes that the word “**may**” in Section 126 (1) was mandatory and that it meant, and should read, “**shall**”. This I understand to mean that unless a registered owner is described as a trustee in the instrument of acquisition of land there can be no trust and the land cannot be said to be held in trust and therefore in this case since the defendants' husband was not registered as a trustee in the instrument of title, he cannot be said to have held half of the land in trust for the plaintiffs father.

In **Mwangi Muguthu -VS- Maina Muguthu (unreported) Madan J** held that as regards Section 126 ,and I agree with him, there is no need to register the defendant as a trustee due to the fact that he was registered as an owner as the eldest son of the family in accordance with Kikuyu custom which has the notion of trust inherent in it. Ordinarily in pursuance of Kikuyu Custom he would have transferred a half share in land to the plaintiffs father but he did not. In any event the section does not make registration as trustee obligatory as it states a person may be described in that capacity. Under Section 143 of the repealed Act a first registration could not be attacked even if it was obtained, made or omitted by fraud or mistake however this section does not exclude recognition of customary trust provided that it can be established by evidence. Parliament did not intend to abolish the Kikuyu customary law by enacting Cap 300 Laws of Kenya( repealed) and I believe that is why the word may is used as opposed to shall. However I do find that even if the word shall was used, for the court to reach an informed decision other factors such as the object or scope of the enactment and the consequences flowing from such construction may be considered as they may rebut the presumption that the use of the word shall makes a particular provision imperative. When a statute uses the word “shall” *prima facie* it is mandatory but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. Customary trust is made orally and is implied and therefore can only be proved by statements of those claiming that it exists hence is not registrable.

This court has a duty to protect the rights and privileges of the people and not to discard them. In my opinion the plaintiff is entitled to succeed in any event as he has proved that there existed a trust in land parcel no L.R No.Magutu/Gaikuyu/261 though not registered as such. The late Kariithi Weru was registered as an owner as the eldest son of the great family of Weru in accordance with the Kikuyu Customary Law which has the notion of trust. Though the late Kariithi Weru died after transferring the suit land to his children this court holds that there cannot be a wrong without a remedy as it has the power to rectify a register to cure injustice. It seems to me that the plaintiff is entitled to succeed on his claim under the principle of trust and the court is inclined to order that the family of the late Nguyo Weru was entitled to one half of original property No.Magutu/Gaikuyu/261, however the plaintiff has claimed 2.62 acres of land.

This court hereby makes a declaration that Kariithi Weru held the suit land in trust for himself and the plaintiff's father in equal share. However, since the plaintiff has not asked for an equal share as he has prayed that the court orders that he is entitled to 2.62 acres, this court finds that the plaintiff is entitled to 2.62 acres as prayed and orders that all the dealings in LR Magutu/Gaikuyu/261 be and are hereby canceled and the register in respect of parcel of no L.R No.Magutu/Gaikuyu/261 be rectified to revert to its original position as at 12th of January 1959, and **2.62** acres to be transferred to the plaintiff on behalf of the late Ngatia Nguyo's family and the **remainder** to be distributed to the late Kariithi Weru's family. No order as to costs.

***Dated and Delivered at Nyeri this 1st day of October 2013***

**A . OMBWAYO**

**JUDGE**